*** T H E H O N ' B L E S R I J U**

+ Writ Petition Nos.15495, 15496, 15497, 15498, 15499, 15500 and 15501 of 2007

% 05-10-2007

Y.Bhaskara Raju S/o Adivi Raju
Railway Contractor,
R/o 1/430, Malavyanagar,
Guduru, Nellore District.

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V s .

$ Union of India, rep., by the General Manager,
South Central Railway,
Rail Nilayam, Secunderabad, A.P., and others.

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> H E A D N O T E :

! C o u n s e l Sri N. Vidyar Prasad, p e t i t i o n e

^ C o u n s e l f o r r e s p o n d e

? C A S E S R E F E R R E D : -

1. 2006(12) SCALE 531
2. 2007 (6) SCJ 171
3. 2006(3) SCJ 511
4. AIR 1973 GUJARAT 256
5. AIR 1983 SC 603
6. (1996) 6 SCC 22
7. 2006(3) ALT 274 (DB)
8. AIR 2005 AP 151

THE HON'BLE SRI JUSTICE P.S.NARAYANA

Writ petition Nos.15495, 15496, 15497, 15498, 15499, 15500 and 15501 of 2007

Dated :05-10-2007

Between:

Y.Bhaskara Raju S/o Adivi Raju
Railway Contractor,
R/o 1/430, Malavyanagar,
Guduru, Nellore District.

.... **PETITIONER**

And:

Union of India, rep., by the General Manager,
South Central Railway,
Rail Nilayam, Secunderabad, A.P., and others.

…. **RESPONDENTS**

COMMON ORDER:

These writ petitions are coming up for admission. Sri Rajiv Reddy, learned counsel, who had accepted notice on behalf of the respondents, had raised a preliminary objection relating to the maintainability of the writ petitions and prayed for time for filing counter-affidavits. Accordingly, counter-affidavits are filed.

2. In all these writ petitions, the question involved being similar and the facts also being similar, all these writ petitions are being disposed of by this common order.

3. Heard Sri N.Vidya Prasad, learned counsel for the writ petitioner in all these writ petitions and Sri Rajiv Reddy, learned counsel representing the respondents in all these writ petitions.

4. These writ petitions are filed praying for a Writ of Mandamus declaring the action of the respondents in not finalizing the bills and refunding the security deposit amounts made by the petitioner in relation to the works under agreements. The details of which had been furnished in the respective affidavits filed in support of all these writ petitions.

5. Counter-affidavits are filed on behalf of the respondents, raising a preliminary objection that these writ petitions are not maintainable, since the remedy, if any, available to the writ petitioner in all these writ petitions would be only to invoke Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short “the Act”) for appointment of an arbitrator with regard to the claims in controversy.

6. Sri N.Vidya Prasad, learned counsel representing the writ petitioner in all these writ petitions, had taken this court through the contents of the affidavits filed in support of the respective writ petitions and would maintain that there is no dispute or controversy relating to the deposit of security deposits by the writ petitioner. The security deposit or the earnest money would stand on a different footing and this question cannot be clubbed with certain other questions, where there may be factual controversy between the parties. The counsel also would submit that the security deposit cannot be forfeited at all and hence, the respondents are bound to make refund of the respective security deposits. Several requests were made in this regard for refund of the respective security deposits. Learned counsel also would maintain that permitting the respondents to retain the security deposits in a way would amount to approving the doctrine of unjust enrichment. Learned counsel also would maintain that the claim of refund of security deposit, being separable from the other claims, it cannot be said that it is a common cause of action and it cannot also be contended that the petitioner may have to invoke the arbitration clause in relation to the admitted amounts also. Learned counsel also would maintain that the stand taken by the respondents that the claim is barred by limitation also cannot be sustained. Learned counsel also would further contend that the principle underlying Order II Rule 2 of the Code of Civil Procedure, also cannot be applied in a matter of this nature. Learned counsel also placed strong reliance on certain decisions to substantiate his submissions in

this regard.

7. Per contra, Sri Rajiv Reddy, the learned counsel representing the respondents in these writ petitions, would maintain that these writ petitions are not maintainable at all since the claim for security deposit cannot be split-up from the other claims and in the light of the clause governing the field, remedy, if any, available to the writ petitioner is to invoke the arbitration clause. Learned counsel also pointed out to the correspondence, the letter and also the legal notice, and would maintain that the demand which is being made by the writ petitioner repeatedly as reflected from correspondence is that these matters be referred to arbitration and the specific stand taken by the respondents in this regard is that the claims are hopelessly barred by limitation and on that ground the said claims are liable to be rejected. Incidentally, the learned counsel also pointed out to certain other grounds raised in this regard. While further elaborating the submissions, the learned counsel would maintain that the very prayers made in these writ petitioners, if carefully examined, these writ petitions are filed relating to non-finalization of the bills and also for the refund of the security deposits. Even the question relating to the refund of security deposits, being dependent on the other facts which may have to be decided, such relief cannot be said to be separable from the rest of the relief and if at all the petitioner is having a remedy, it should be to invoke Section 11(6) of the Act or pursue any other legal remedy in accordance with law, but definitely not by way of a writ petition, at any rate. To substantiate his submissions, the learned counsel pointed out to the relevant portion of the correspondence in this regard. A request was made by the writ petitioner himself to refer these claims to an arbitrator. Learned counsel also placed strong reliance on certain decisions to substantiate his submissions.

8. Heard the learned counsel on record, perused the respective pleadings in these writ petitions and the relevant material papers on

which reliance was placed by the respective parties.

9. The principal question which may have to be decided is that in the light of the respective stands taken by the parties whether these writ petitions are maintainable.

10. Strong reliance was placed on Regulations for tender and contracts for the guidance of engineers and contractors for engineering works, and Regulations 63 and 64 deal with the matters finally determined by the railways and demand for arbitration, respectively, which read as under:

> "63. **Matters finally determined by the Railway –** All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within 120 days after receipt of contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provisions has been made in clauses 8(a), 18, 22(5), 39, 43(2), 55, 45(A), 55-A(3), 57, 57-A, 61(1), 61(2) and 62(1)(b) of General Conditions of contract or in clause of the special conditions of the contract shall be deemed as 'expected matters' and decision of the Railway authority, thereon shall be final and binding on the contractor provided further that 'expected matters' shall stand specifically excluded from the purview of the Arbitration clause and not be referred to arbitration.
>
> 64(1) (i) **Demand for Arbitration –**
>
> In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'expected matters referred to in clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on

disputed matters, shall demand in writing that the dispute or difference be referred to arbitration. …"

11. In the respective affidavits filed in support of these writ petitions it is stated that the writ petitioner is a reputed railway contractor and has been doing several contract works under the respondent-railways. The respective agreements had been referred to and as per the terms and conditions of the agreements for works, the relevant security deposits made also had been specified. Further, specific stand had been taken that the petitioner has been requesting the respondent-railway administrative officers to finalise the contract and obtain no-due certificate from the petitioner and pay the amounts due to him under the contract. It is also stated that the petitioner has been reposing total confidence with the railway administration, being a reputed contractor, but since he cannot afford to pick up a quarrel with the railway administration in view of the confidence, repeated requests were being at once to refund the balance amount payable, inclusive of the respective security deposits. Several facts had been narrated and also specific stand had been taken that in the facts and circumstances it cannot be said that the claims are barred by limitation.

12. In the respective counter-affidavits filed on behalf of the respondent-railways, preliminary objection had been taken relating to the maintainability of the writ petitions on the ground that the petitioner is having an effective and alternative remedy by way of filing arbitration application under the Act for redressal of his grievance. It is also made clear that these counter-affidavits are being filed with regard to the preliminary objection as to the maintainability of these writ petitions. It is stated that the petitioner, by his letter dated 2610.1996 addressed to the General Manager, South Central Railway, Secunderabad, had put forth certain claims and requested him to make payments. The relevant paragraph is extracted as under:

"… the petitioner by his letter dated 26.10.1996 addressed to

the General Manager, South Central Railway, Secunderabad, had put forth certain claims and requested him to make payments, and also stated that if for any reason it is not done within 15 days and the same may be treated as firm demand referring the claims as disputes to be settled through arbitration as per the provisions of the General Conditions of the Contract. Subsequently, a legal notice dated 31.01.2007 was issued on behalf of the petitioner which was addressed to the General Manager, South Central Railway requesting him to refer his claims for Arbitration under Clause 64 of the General Conditions of the Contract within a period of 30 days failing which he will be constrained to move the Hon'ble High Court of Andhra Pradesh under Section 11(6) and (8) of the Arbitration and Conciliation Act, 1996."

13. It is also stated that the respondent-railways, by its letter dated 29.03.2007 addressed to the petitioner, had stated that the request of the petitioner for appointment of Arbitrator was examined and that the claim for Arbitration is time barred and that the request for appointment of Arbitrator is rejected.

> "… the respondent-railways, by its letter dated 29.03.2007 addressed to the petitioner, had stated that the request of the petitioner for appointment of Arbitrator was examined and that the claim for Arbitration is time barred and that the request for appointment of Arbitrator is rejected. To this letter dated 29.03.2007 of the respondents- Railways, the petitioner addressed a letter dated 05.05.2007 to the General Manager, South Central Railway, Secunderabad, once again demanding to refer the matter for arbitration under the provisions of General Conditions of Contract. To the said letter of the petitioner dated 05.05.2007, a reply was given by the respondent-railways by letter dated 19.06.2007 to the petitioner that his request for arbitration after 17 years is highly belated and delayed and cannot be accepted. I submit that the request for arbitration made by the petitioner was rejected by the respondents railways on the ground of abnormal delay of 17 years. I submit that when the petitioner's request for arbitration was rejected by the Respondents Railways, the petitioner herein is having an alternative and effective remedy by filing Arbitration Application under Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator to

adjudicate the disputes of the petitioner, the maintainability of which would be decided by the Hon'ble Court but not in the above writ petition which is not maintainable under law. In fact the claim of Security Deposit and not finalizing the bill were already asked by the petitioner in his letters dated 26.10.2006, in the legal notice dated 31.01.2007 and in his letter dated 05.05.2007 addressed to the General Manager, Secunderabad. Now the petitioner in the above writ petition cannot ask the prayer to direct the respondents to finalise the bill and to refund of the security deposit amount. I submit that these two claims cannot be agitated and cannot be gone into the above said writ petition. As stated above the petitioner had already asked these two claims in his letters and in the legal notice as stated above addressed to the General Manager, South Central Railway, Secunderabad to refer the claims for arbitration which were rejected as time barred on the ground of abnormal delay of 17 years by the respondents railways. As already stated above against such rejection a remedy lies under the Arbitration and Conciliation act, 1996 to the petitioner. Hence, the above said writ petition has to be dismissed as not maintainable on this ground alone. In fact the petitioner herein admitted in Part-11 of the above said writ petition that he is reserving his claim so far as the other items are concerned for taking proper action for appointment of the Arbitrator under Arbitration and Conciliation Act, 1996."

14. Thus specific stand had been taken that the terms and conditions of the contract cannot be adjudicated in the writ petition and hence these writ petitions are liable to be dismissed. Further, specific stand had been taken that in case if the petitioner invokes Section 11(6) of the Act for appointment of an arbitrator with regard to the claims in question, the respondent-railways reserve their right, without prejudice to the contentions raised with regard to the issue of limitation that such claims made by the petitioner are time-barred and his request for appointment of arbitrator also being time-barred, the same cannot be considered.

15. Sri Vidya Prasad, learned counsel representing the writ petitioner in all these writ petitions placed strong reliance on ***Saurabh***

Prakash Vs DLF Universal[1], wherein the Apex court at paragraphs 45 and 46 observed as under:

> " The distinction between a security and an earnest money has also been pointed out by this Court in Maula Bux v. Union of India ((1969)2 SCC 554) in the following terms:
> "4. Under the terms of the agreements the amounts deposited by the plaintiff as security for due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. The High Court observed that the deposits so made may be regarded as earnest money. But that view cannot be accepted. According to Earl Jowitt in Dictionary of English Law at p.689:" Giving an earnest or earnest-money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds". As observed by the Judicial Committee in Kunwar Chiranjit Singh v. Har Swarup:
> "Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."
> In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money."
> 46. Referring to Section 74 of the Indian Contract Act, it was observed:
> "There is authority, no doubt coloured by the view which was taken in English cases, that Section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach, Natesa Aiyar v. Appayu Padayachi; Singer Manufacturing Company v.Raja Prasad; Manian Pattar v. Madras Railway Company. But this view is no longer good law in view of the judgment of this Court in Fateh Chand case. This Court observed at p.526:
> "Section 74 of the Indian Contract Act deals with the measure of damages in two clauses of cases: (i) where the contract names a sum to be paid in case of breach, and (ii) where the

contract contains any other stipulation by way of penalty…'
The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74, reasonable compensation not exceeding the penalty stipulated for.' "

This Court also observed:

"It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases hereupon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture, and that,

"There is no ground for holding that the expression 'contract contains any other stipulation by way of penalty' is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited."

16. Learned counsel also placed reliance upon a decision of the Apex Court in ***H.K.Seema v. Sripurkar***[2], wherein the Apex Court while dealing with Section 11(6) of the Act observed that the very fact that the parties chose to create the Memorandum of Understanding

dated 19.01.2005 suggests that the order regarding 1,20,000 square feet of FSI was never closed or at least was never treated to have closed and in that sense it was still a live issue and the parties were at loggerheads on that issue. It was also observed by the Apex Court that once it is concluded that the designated Judge was right in holding that there was a live issue, the question of limitation automatically gets resolved. Where negotiations were still on, there would be no question of starting of limitation period. Since the issue in between the parties is still alive, there would be no question of stifling the arbitration proceedings by holding that the issue has become dead by limitation. The question of limitation to be decided by arbitral tribunal.

17. Learned counsel also further placed strong reliance on the decision of the Apex Court in ***Hari Shankar Singhania v. Gaur Harisinghania***[3], wherein the Apex Court, while dealing with Section 20 of the Arbitration Act, 1940 and Article 137 of the Limitation Act 1963 observed that it is now well settled that Article 137 of the Limitation Act, 1963 applies to application under Section 20 of the Arbitration Act, 1940 and accordingly, application under Section 20 of the Act for filing the arbitration agreement in Court and for reference of disputes to arbitration in accordance therewith is required to be filed within a period of three years when the right to apply accrues. The right to apply accrues when difference or dispute arises between the parties to the arbitration agreement.

18. Further, the learned counsel representing the writ petitioner in these writ petitions placed strong reliance on the decision of the Gujarat High Court in ***M/s Variety Body Builders v. The Union of India***[4], wherein the learned Judge observed at para 13, which is as under:

> "In ordinary course a security deposit is intended to be refunded and the amount in question is kept in deposit only for

the purpose of securing the due performance of the contract. The said amount is forfeited only when a breach of the contract occurs and results in a legal injury. Therefore, if the railway administration wants to forfeit that amount or a part thereof, the burden is upon it to show that necessary requirements for the forfeiture exists. In this case the plaintiff has come forward with a plea that the defendant is not entitled to forfeit any part of the amount of security deposit. In reply to this plea of the plaintiff, the defendant has merely relied upon the contractual stipulations regarding forfeiture I case of breach of the contract. The result is that there is no issue seeking to prove whether the breach has resulted in any legal injury or any loss or damage to the railway administration. Now the law does not presume that a legal injury or loss and damage occurs the moment the contract is broken. The question whether a breach of contract has resulted in legal injury or actual loss or damage to the aggrieved party is essentially and wholly a question of fact. Therefore, so long as the facts necessary to prove this aspect of the matter are not pleaded, and so long as the parties do not get proper opportunity to prove their respective contentions on this aspect of the matter, it would not be possible for the court to hold that legal injury exists or that any damage or loss has occurred to the aggrieved party. By reference to the written statement, I find that there is absolutely nothing in any part thereof to show that the breach of the suit contract by the plaintiff has resulted in any legal injury. Obviously, therefore, there is no issue on this point and after referring to the evidence recorded in the case, I find that there is no evidence even of a casual type to prove that the plaintiff's breach of contract has resulted in any legal injury to the defendant. I specifically invited Shri Bhatt, the learned advocate of the defendant, to draw my attention to any part of the record which would give even an indirect indication of the existence of legal injury. Shirt Bhatt was not able to point out to any such evidence. But his contention was that since it is found that it is the plaintiff who has broken the contract and since the unfulfilled part of the contract was required to be executed by the railway, the court must presume that there is legal injury. I find myself unable to agree with this contention because existence of legal injury is not a fact which can be washed away or imagined. Not all the breaches of contracts result in loss, damage or injury, and this would be more so, in case of

commercial contracts where for varieties of reasons, the breach may result in profit or in a situation where there is neither any profit nor any loss. Therefore, from the mere facts that the contract was broken by the other side and that the remaining part of the contract was required to be performed either departmentally or by giving a new contract, the court cannot hold that the legal injury, which is contemplated by Section 74 of the Contract Act has occurred."

19. The learned counsel representing respondent-railways relied upon the decision of this Court in W.P.No.16049 of 2006 dated 03.08.2006, wherein the learned Judge granted leave and liberty to the petitioner to work out appropriate remedy available under law and dismissed the writ petitions.

20. The learned counsel also placed strong reliance on the decision of the Apex Court in ***Titaghur Paper Mills Co.Ltd., v. State of Orissa***[5], wherein the Apex Court observed at paras 6 and 11, as under.

" 6. We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the prescribed authority under sub-s. (1) of Section 23 of the Act, then a second appeal to the Tribunal under sub-s. (3) (a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. In Raleigh Investment Co. Ltd. v. Governor General in Council, (1947) 74 Ind. App. 50: (AIR 1947 PC 78) Lord Uthwatt, J. in delivering the judgment of the Board observed that in the provenance of tax where the Act provided for a complete machinery which enabled an assessee to effectively raise in the courts the question of the validity of an assessment denied an alternative jurisdiction to the High Court to interfere. It is true that the decision of the Privy Council in Raleigh Investment Company's case, (supra) was in relation to a suit brought for a declaration that an assessment made by the Income-tax Officer was a nullity, and it was held by the Privy Council that an assessment made under the machinery provided by the Act, even if based on a provision subsequently held to be ultra vires, was not a nullity like an

order of a court lacking jurisdiction and that S. 67 of the Income-tax Act, 1922 operated as a bar to the maintainability of such a suit. In dealing with the question whether S. 67 operated as a bar to a suit to set aside or modify an assessment made under a provision of the Act which is ultra vires, the Privy Council observed.

"In construing the section it is pertinent, in their Lordships opinion to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the courts the question whether a particular provision of the Income-tax Act bearing on the assessment made is or is not ultra vires. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to inquire into the same subject-matter."

11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-s. (1) of S. 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-s. (3) of S. 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under S. 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Art. 226 of the Constitution. It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was-stated with great clarity by Willes, J. in Wolverhampton New Water Works Co. v. Hawkesford, (1859) 6 CBNS 336 at p. 356 in the following passage:

"There are three classes of cases in which a liability may be established founded upon statute. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

> The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspaper Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co., 1935 AC 532 and Secretary of State v. Mask and Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.

21. Further, strong reliance was placed on the decision of the Apex Court in ***State of U.P. Vs. Bridge & Roof Co. (India) Limited*** [6], wherein, the Apex Court at para 21 observed as under:

> "There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia or settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy-in this case, provided in the contract itself-is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognized situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 – whether for issuance of mandamus or any other writ, order or direction – was misconceived for the reasons mentioned supra."

22. The Division Bench of this Court in ***M/s MRKR – MBGEC, rep. by C.Monohar Reddy v Chief Administrative Officer, Construction, South Central Railway, Secunderabad*** [7], while dealing with A.P. Minor Mineral Concession Rules 1966 and the

availability of alternative remedy and the maintainability of the writ petitions, held in paras 14 to 17 as under:

> "We are also inclined to approve the view expressed by the learned single Judge in the reference order on the maintainability of the writ petition. It is true that adjudication of the plea raised by the petitioners against the levy of seigniorage charges on ordinary sand involves interpretation of the terms and conditions of contract, but, that itself does not justify entertaining of a petition under Article 226 of the Constitution of India ignoring the fact that an equally efficacious alternative remedy is available to the petitioners either by filing civil suit or by seeking reference to an arbitrator and Memo dated 15.12.2004 issued by Principal Chief Engineer cannot be treated as conclusive of the interpretation of the terms and conditions of agreement for the purpose of making departure from the settled law that the High Court will not entertain writ petition under Article 226 of the Constitution if an effective alternative remedy is available to the petitioner. In this connection, we may usefully refer to some judgments of the Supreme Court. In State of U.P. V.Bridge & Roof Co. (India) Ltd.,((1996)6 scc 22) the Supreme Court was called upon to consider whether the rates quoted by the contractor were inclusive of the sales tax, if any, on the constructional plants, materials and supplies required for the purpose of execution of the contract. The respondent, who was awarded contract for rehabilitation and improvement of certain stretch of road in Uttar Pradesh applied to the Commissioner of Sales Tax, Uttar Pradesh for composition of tax liability. The Deputy Commissioner, Sales Tax, in exercise of the power delegated to him by the Commissioner, passed order dated 27.05.1992 that sales tax should be deducted at the rate of 1% at the time of payment of balance amount. After three years, the respondent filed writ petition in Allahabad High Court questioning the deduction of sales tax. The High Court did not go into the issue of maintainability of the writ petition, but disposed of the same by observing that the Government shall deduct only 1% of the bill in question upto 31.03.1995. While setting aside the High Court's order on merits, the Supreme Court held:
>
> In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings i.e, in the writ petition filed by it. The High Court

appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and couldnot have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not grated the said prayer.

Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of sub-clause (4) of clause 70 of the contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the civil court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the civil court, as the case may be, according to law. Similarly if the Government says that any overpayment has been made to the respondent, its remedy also is the same."

23. In ***M/s Gail (India) Ltd. Vs. M/s Nagarjuna Cerachem Pvt. Ltd.***[8], a Division Bench of this Court had an occasion to deal with Section 7 of Arbitration and Conciliation Act, 1996, the existence of arbitration clause and the invocation of the writ jurisdiction. The Division Bench referred the following cases, 1) State of J & K v.

Ghulam Mohd. Dar AIR 2004 SC 510:2003 AIR SCW 6457:2003(1) DT(SC) 59, 2) ABL International Ltd. V. Export Credit Guarantee Corporation of India Ltd. 2004(3) SCC 553, 3) National Highways Authority of India v. Ganga Enterprise, AIR 2003 SC 3823 : 2003 AIR SCW 4381 : 2003(7) SCC 410, 4) State of U.P. v. Bridge & Roof Co. (India) Ltd. AIR 1996 SC 3515 : 1996 AIR SCW 3626 : 1996 ALL LJ 1805 : 1996 (6) SCC 22, 5) Kumari Shrilekha Vidyarthi v. State of U.P. AIR 1991 SC 537 : 1993 AIR SCW 77 : 1993 All LJ 4 : 1991(1) SCC 212, 6) D.F.O. v. Ram Sanehi singh, AIR 1973 SC 205: 1973(3) SCC 864, and 7) K.N.Guruswamy v. State of Mysore, AIR 1954 SC 592, and observed at para 12 as under:

> "Admittedly, there is an arbitration clause in the agreement under which all dispute and differences, if not settled mutually, will have to be referred for arbitration. The disputes and differences will have to be decided by the arbitrator only who can grant adequate relief. May be that the appellant is an instrumentality of the State, but it is not discharging any public function. Supply of gas is not a public function. It has entered into a commercial contract with the respondent/writ petitioner. There is a dispute amongst the prties as to whether there is any breach of obligation on the part of the appellant or the writ petitioner/respondent. In such like matters, on the ratio of the decsion of the Supreme Court in Bridge & Roof Co.,(India) Ltd.,(supra), as approved in ABL International Ltd., (supra) it is not at all permissible to entertain a petition filed under Article 226 of the Constitution of India or invoke the extraordinary jurisdiction because of the existence of an effective remedy, which is provided the contract itself. Availability of an alternative remedy is a good ground for the Court to decline to exercise its extra-ordinary jurisdiction under Article 226 of the Constitution, which aspect the learned Single Judge has failed to notice and has gone to the extent of holding that the action of the appellant is arbitrary. Such a decision, even if has to be taken, prima facie, ought not to have been taken by the Court, but it is for the arbitrator to take such a decision on facts."

24. Further reliance also was placed on several decisions relating to the scope and ambit of judicial review in the context of the

contractual field. This Court need not refer to the said decisions in elaboration, since the principles in this regard being well settled. The only question which may have to be considered, in fact, which had been argued in elaboration, is that whether in the facts and circumstances of the case the writ petitions are to be entertained, at least in relation to the reliefs prayed for in the writ petitions for refund of the security deposits. The principal contention of the learned counsel representing the writ petitioner is that these security deposit amounts being not in controversy at all, it cannot be said to be a claim in dispute and hence such issue need not be referred to an arbitrator at all and automatically the writ court can entertain these writ petitions and issue suitable directions in this regard.

25. On the contrary, the learned counsel representing the railways would maintain that this question or this issue also in a way is interlinked with the other claims and the same being not separable at any rate, inasmuch as these writ petitions for refund of security deposits also would be dependent on certain factual controversies, it cannot be said that it is an undisputed claim and even otherwise, the question of limitation also had been raised and in that view of the matter, the said relief cannot be separated from the other reliefs and hence the writ petitions are to be dismissed as not maintainable.

26. In the light of the peculiar facts and circumstances and also in the light of the limitations imposed on this court in the context of judicial review in relation to the contractual field and also in the light of Regulations 63 and 64, which had been referred to supra, and since it is not in controversy between the parties that the petitioner can invoke the arbitration clause and the remedy relating thereto being available this Court is of the considered opinion that these writ petitions are to be held to be not maintainable. However, it is made clear that the writ petitioner is at liberty to pursue the other legal remedies available to him either under Section 11(6) of the Act or any other appropriate

remedy available to him in law. Except making these observations, no other relief as such can be granted in favour of the petitioner in all these batch of writ petitions.

Accordingly, with the above liberty, the writ petitions shall stand dismissed. No order as to costs.

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05-10-2007

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[1] 2006(12) SCALE 531
[2] 2007 (6) SCJ 171
[3] 2006(3) SCJ 511
[4] AIR 1973 GUJARAT 256
[5] AIR 1983 SC 603
[6] (1996) 6 SCC 22
[7] 2006(3) ALT 274 (DB)
[8] AIR 2005 AP 151